# REPORT TO:

# Department for Communities

# UNDER ARTICLE 24

# OF

# THE COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE (NI) ORDER (2003)

 **April 2019**

**Introduction**

24 (*1) The Commissioner shall—*

*(a) keep under review the working of this Order;*

*(b) make reports on it to the Department for Communities in accordance with the following provisions of this Article.*

*(2) The first report under this Article shall be made as soon as practicable after the third anniversary of the making of this Order.*

*(3) A subsequent report under this Article shall be made at such time as the Commissioner thinks fit, not being earlier than three years after the making of the last previous report.*

*(4) A report under this Article—*

*(a) shall include the views of the Commissioner on the adequacy and effectiveness of this Order; and*

*(b) may contain recommendations as to amendments to this Order which in the opinion of the Commissioner are necessary or desirable.*

*(5) The Department for Communities shall lay a copy of every report sent to them under this Article before the Assembly.*

This report is prepared in compliance with above Article 24 of Northern Ireland Commissioner for Children and Young People (NI) Order 2003 (‘NICCY’). The Article requires the Commissioner to keep under review the working of the Order and to make reports on its adequacy and effectiveness, along with recommendations for amendment which are deemed to be necessary or desirable. Such reports are to be made when the Commissioner thinks fit and not earlier than three years from the making of the last report.

The first report was submitted in 2007 to OFMDFM however, no response was received. At the suggestion of the Office of the First and Deputy First Minister a second report was submitted by the then Commissioner, Patricia Lewsley-Mooney in May 2013[[1]](#footnote-1). This report was informed by the comprehensive Review of the Duties and Powers of the NI Commissioner for Children and Young People by Professors Barry Fitzpatrick and Brice Dickson[[2]](#footnote-2).

This report is also informed by the proposed Commissioner for Children and Young People (Jersey) Law 201[[3]](#footnote-3) which has been developed following engagement with all UK Commissioners for Children and the Ombudsman for Children in Ireland.

On my appointment as Commissioner I endorsed and re-issued my predecessor’s Article 24 Report in March 2015. Positive engagement continued to take place with OFMDFM and particularly the Ministers. In June 2015 at our meeting with the then Deputy First Minister Martin McGuinness, he verbally agreed that the recommendations should be pursued. Unfortunately no progress was made and to date the only formal response received from Government remains a letter of April, 2015 concerning once aspect of the report.

Given that the legislation has been in operation for nearly 16 years without substantive amendment, I am of the view that formal considerations of the recommendations from the reviews must be progressed as a matter of urgency Therefore I am submitting this report in accordance with Article 24 of The Commissioner for Children and Young People (NI) Order, 2003. I am of course mindful that there has been no Assembly or Executive in Northern Ireland since March, 2017 but the need for review is no less urgent.

Notwithstanding that the 2003 Order remains unchanged, during my first term, significant work has been undertaken by my office to maximise the use and impact of NICCY’s powers in order to fulfil various statutory duties. In that time a new approach to our ‘informal’ investigative casework has been adopted which aligns more readily with Articles 12 and 13 and also a formal investigation is being currently pursued under Articles 16-23. In our view we have made significant progress in more fully utilising the legislation to meet NICCY’s statutory remit in fulfilling our primary aim to safeguard and promote the rights and best interests of children and young people in Northern Ireland. The recommendations which follow reflect this.

**I therefore call on government to implement the recommendations set out below and to use the most appropriate legislative vehicle to make the amendments sought.**

This report should be read in conjunction with the previous Reviews and Reports set out above and sets out the up to date headline recommendations made by the Commissioner for amendments to the present legislation. The rationale for each recommendation is expressed in brief in the following report and this can be substantially expanded on at later stages of the review process.

**Executive Summary of Recommendations**

**Compliance and Structural Changes**

That the 2003 Order be amended to:

1. confer upon it the independence required by the Paris Principles as an Independent Human Rights Institution by making NICCY an institution of the NI Assembly.
2. insert a clause stating that in relation to bringing legal proceedings, the Commissioner need not be a victim or potential victim of the act in question.
3. enable greater focus on longer term outcomes and strategic aims of the organisation provide that the Commissioner should have a single term of 7 years.
4. include a requirement upon NICCY to produce a periodic report on the progress by the NI Executive to the NI A Assembly regarding the protection of rights and best interests of children in Northern Ireland, together with a duty on the Executive to provide a comprehensive response to each of the points raised in the report within a timeframe of no more than 6 months.
5. stipulate (at Article 24) a timeframe of no more than 6 months - to include the report being laid before the Assembly, within which time a comprehensive response to this report shall be received by the Commissioner.

**Advisory Role**

1. The 2003 Order be amended to place a duty on government to consult with NICCY before progressing new legislation, strategies or policies which impact on children and young people. Such consultation to take place prior to any general consultation period.

**Updating remit provisions**

1. The 2003 Order be amended to remove the “duplication clauses” at Articles 9(4), 10(3), 11(4), 12(2)(b), 12(3), 13(1) and 15(3).

**Legislative Context**

The Office of the Commissioner for Children and Young People was set up in 2003 under The Commissioner for Children and Young People (NI) Order 2003, (hereafter the 2003 Order).

The 2003 Order states that the Commissioner’s principal aim in exercising her/his functions under the Order is to ‘safeguard and promote the rights and best interests of children and young persons’ (Art. 6 (1)).

The 2003 Order then sets out the duties and powers of the Commissioner to enable them to carry out this aim. These are set out in Articles 7 and 8 respectively.

The Duties of the Commissioner include:

* Promoting an understanding of the rights of children and young persons and matters relating to their best interests, together with an awareness of the importance of those rights and a respect among children and young persons for the rights of others;
* Keeping under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young people and services provided by relevant authorities for children and young persons;
* Advising the Secretary of State, The Executive Committee of the Assembly and a relevant authority on the rights or best interests of children and young persons, either if requested to, or if the Commissioner thinks it appropriate;
* Taking steps to ensure children, young people and their parents are made aware of the functions of the Commissioner, the location of her office and the ways in which they may communicate with her; and
* Encouraging children and young people to communicate with the Commissioner, seeking their views on her functions, ensuring the Commissioner’s services are available, so far as practicable, to them where they live and that anything the Commissioner publishes which is aimed at them, takes account, so far as practicable of their age, understanding and usual language.

The Powers of the Commissioner include:

* Undertaking, commissioning or providing financial, or other assistance, for research, or educational activities, concerning the rights or best interests of children and young people, or the exercise of the Commissioners functions;
* Issuing guidance on best practice, regarding the rights or best interests of children and young persons;
* Conducting such investigations as she considers necessary or expedient;
* Compiling information, providing advice, making representations or recommendations and publishing any matter regarding the rights or best interests of children and young persons;
* Reviewing advocacy, complaint, inspection and whistle blowing arrangements for relevant authorities;
* Assisting with complaints to relevant authorities;
* Investigating complaints against relevant authorities; and
* Bringing, intervening in or assisting with legal proceedings.

Articles 9 and 10 relate to the ability to review advocacy, complaint, inspection and whistle blowing arrangements of relevant authorities both generally and in relation to a child specific complaint.

Article 11 sets out the provisions which empower NICCY to assist with complaints to relevant authorities and Article 12 sets out the provisions to permit the investigation of complaints against relevant authorities. Article 13 contains the restrictions and exclusions on the use of Article 12.

Our casework function is primarily based on Articles 11, 12 and 13 above.

Article 14 sets out the legal powers of the Commissioner to bring, intervene or assist in legal proceedings and Article 15 clarifies the conditions for the use of Article 14.

Articles 16 to 23 contain the provisions on which the Commissioner is empowered to conduct formal investigations.

The three schedules to the Order set out the list of relevant authorities (Schedule 1), the practical provisions in relation to the appointment and tenure of the Commissioner, staffing and funding of the office and the annual reporting requirements (Schedule 2) and specific provisions in relation to investigations (Schedule 3).

**Recommendations As To Amendments To The Order Which Are Necessary And Desirable**

1. **Paris Principles Compliance**

As an Independent Human Rights Organisation (IHRI) it is vital that NICCY maintains its actual and necessary independent status in line with Principles relating to the Status of National Institutions (The Paris Principles)[[4]](#footnote-4) compliance and recognised international ‘rights’ standards. The Paris Principles are a set of international guidelines to which Human Rights Bodies, such as NICCY, are required to adhere in order that they maintain the necessary independence. Additionally there are a number of instrument from UN Committee on the Rights of the Child outlining the role of IHRIs for children and ensuring that governments allow them to perform their functions appropriately and effectively[[5]](#footnote-5).  There are longstanding concerns that NICCY independence ‘compromised’ by being an Arm’s Length Body (ALB) of a Government Department rather than accountable to the NI Assembly. Both Reviews of NICCY’s founding legislation by Professors Brice Dickson and Barry Fitzpatrick outline where the 2003 Legislation falls short of compliance with international standards and calls for NICCY to be made an institution of the NI Assembly, thereby conferring upon it the independence required by the ‘Paris Principles’.  This is would not be a unique arrangement as currently the NI Public Services Ombudsman and the NI Auditor General are both bodies of the Assembly.

**Recommendation 1:** I recommend that to confer upon it the independence required by the Paris Principles as an Independent Human Rights Institution by making NICCY an institution of the NI Assembly.

1. **Power to bring Legal Proceedings**

Article 14 of the 2003 order gives the Commissioner the power to bring legal proceedings (other than criminal proceedings) involving law or practice concerning the rights or welfare of children or young persons (Art 14 (1) (a)). When NICCY attempted to exercise these powers previously, the High Court held that we did not have the required status of victimhood to bring such a legal challenge if we were seeking to reply on human rights arguments (2004 NIQB 40 paragraph 14). Girvan J. stated*:*

*“ In relation to the question of the incompatibility of the proposed legislation with the Convention, the Commissioner faces the legal problem created by the need to establish victimhood within the Act and Convention. In addition, under the Northern Ireland Act 1998 itself a challenge to Ministerial action or legislation on the grounds of a breach of Convention obligations must be brought by a “victim”. The Commissioner herself is not a victim and the fact that she is empowered to bring proceedings under the 2003 Act does not of itself confer upon her a power to bring proceedings to challenge legislation or draft legislation. Miss Higgins sought to argue that in some way the 2003 Act impliedly abrogated the victimhood requirement in relation to proceedings brought by the Commissioner. I cannot read the legislation in this way however”.*

This clearly restricts NICCY’s ability to safeguard and promote children’s rights via strategic litigation as we cannot employ all of our legal functionality to bring cases where we seek to rely on incompatibility with either a European Convention such as the ECHR, the Human Rights Act itself or the UNCRC to address an infringement of children’s rights. It is vital therefore that NICCY should have the power to bring such cases in the same way that other National Human Rights Institutions (as is intended for the NI Human Rights Commission) can do.

**Recommendation 2:** I recommend that an amendment is made to the 2003 Order to insert a clause stating that in relation to bringing legal proceedings, the Commissioner need not be a victim or potential victim of act in question.

1. **Term of Office**

To enable greater focus on longer term strategic aims, outputs and outcomes for Children and Young People Children’s Commissioner across Britain and Ireland are appointed for one term of 6 years (England and Scotland), 7 years (Wales) and 2 terms of 6 years (Republic of Ireland). Additionally it is proposed that the Commissioner in Jersey will have one 8 year term.

It is the ‘preferred option’ and in line with recognised good practice in, that the term of Office of Commissioner be for a single term but which covers a 7 year time period. This enables a Commissioner for consider implement their priorities without being concerned about reappointment.

**Recommendation 3:** I recommend that the to enable greater focus on longer term outcomes and strategic aims of the organisation provide that the Commissioner should have a single term of 7 years.

1. **Periodic Reporting**

In line with NICCY’s monitoring and advisory roles, NICCY has published the ‘Statement on Children’s rights in Northern Ireland’ (SOCRNI) in June 2018 to be followed by biennial updates with the. next report, therefore, due in 2020. It is vita lthat that NICCY provides a clear and focused review and analysis of the progress of the Executive regarding relevant aspect of the promotion and safeguarding of the rights and best interests of children and young people. Such Review should include children who are in the most vulnerable and marginalised situations. These reports should be placed on a statutory footing and it should also be necessary for NI Executive to respond to each of the points raised in the Commissioner’s report.

**Recommendation 4:** I recommend that the 2003 Order be amended to include a include a requirement upon NICCY to produce a periodic report on the progress by the NI Executive to the NI Assembly regarding the protection of rights and best interests of children in Northern Ireland, together with a duty on the Executive to provide a comprehensive response to each of the points raised in the report within a timeframe of no more than 6 months.

1. **Review of the 2003 Order**

As stated above, Article 24 of the 2003 Order (as amended) states that the Commissioner shall keep under review the working of this Order and make reports on it to the Minister for the Communities in accordance with the contents of that Article. However, there is no stipulation as to when the Commissioner will receive a response to such a report. As stated previously, the first review report submitted in 2007, was not responded to and therefore none of the recommendations were implemented. While there was some engagement in relation to those issued in 2013 and 2015, no substantial progress has been made nor has it been possible to do so since the collapse of the NI Executive in January 2016.

**Recommendation 5:** The 2003 Order be amended to stipulate (at Article 24) a timeframe of no more than 6 months - to include the report being laid before the Assembly, within which time a comprehensive response to this report shall be received by the Commissioner.

1. **Duty on Government Departments to Consult**

As the Statutory Body established to promote the rights and best interests of Children and Young People and in line with my duty to advise government concerning relevant strategic, policy and legislative proposals, it is crucial that NICCY be involved at the outset to assist in ensuring these proposals are compliant with children’s rights. Our advisory role is clearly laid out within the legislation in Articles 7(4), 8(2) and 8(6). In recognition of this and indeed in compliance with Government’s common law duties in relation to consultation generally, it would be important that NICCY is consulted by Government Departments at the earliest juncture so that we can provide advice which will shape subsequent legislation, policies or strategies. The benefit of early consultation with NICCY can be see, fro example, in the provisions of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the Children’s Services Co-operation Act (NI) 2015, the draft Children’s and Young People’s Strategy and the Community Planning Participation Guidance. In all of these areas NICCY were consulted with at the outset and were able to provide advice to Officials to ensure child rights compliance.

**Recommendation 6:** I recommend that the 2003 Order be amended to place a duty on Government to consult with NICCY before developing relevant legislation / strategies and policies; this to take place prior to any general stakeholder consultation period.

1. **Duplication Clauses**

When the legislation was originally formulated in 2003, the Assembly sought to ensure that NICCY’s remit and function did not overlap with the functions of existing organisations and therefore the above clauses were inserted to ensure that duplication did not occur. In the 16 years in which we have operated this legislation, we have never received any challenge, either formal or informal, from any organisation with a concern that we had duplicated their work. NICCY has developed a suite of Memoranda of Understanding (MoUs) with relevant statutory Inspectorate and Oversight Bodies and other Human Rights Institutions which sets out our individual functions, information sharing protocols and partnership working processes. NICCY have successfully worked with organisations such as NIHRC, ECNI, RQIA CJI and NIPSO on areas of common interest and found that our powers and duties were complementary. Given the new landscape of collaboration between the various bodies, I am of the view that these duplication clauses are no longer necessary and that any areas of potential concern can be managed internally between organisations on the bases of the MOUs set out above. It must also be noted that good stewardship of public funding requires all bodies to avoid duplication.

**Recommendation 7:** I recommend that the 2003 Order be amended to repeal Articles 9(4), 10(3), 11(4), 12(2)(b), 12(3), 13(1) and 15 (3).

**Conclusion**

In conclusion therefore I wish to highlight that the rights ‘landscape’ in Northern Ireland was different when the legislation was originally drafted; now with the passage of time, the “settling” of NICCY’s role and the respect which is shown for the functions of the Office, the duplication clauses should be removed. Our approach to the use of our powers has developed and matured therefore what is required is a refinement of existing powers. NICCY’s status as an Independent Human Rights Institution should be recognised, realised and protected. The need not to require an individual victim will ensure that NICCY fulfils its legislative remit in the interests of greater numbers of our children and young people.

In addressing and implementing the recommendations within this report, NICCY will be better placed to fulfil its statutory remit. I therefore commend this report to you and look forward to a comprehensive response.

**Koulla Yiasouma**

**Northern Ireland Commissioner for Children and Young People. April 2019**

1. <https://www.niccy.org/about-us/childrens-rights/niccy-legislation/> [↑](#footnote-ref-1)
2. Ibid  [↑](#footnote-ref-2)
3. <https://statesassembly.gov.je/scrutiny/Pages/Review.aspx?reviewid=317> [↑](#footnote-ref-3)
4. Adopted by the [United Nations Human Rights Commission](https://en.wikipedia.org/wiki/United_Nations_Human_Rights_Commission) by Resolution 1992/54 of 1992, and by the [UN General Assembly](https://en.wikipedia.org/wiki/UN_General_Assembly) in its [Resolution](https://en.wikipedia.org/wiki/United_Nations_General_Assembly_resolution) 48/134 of 1993, https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx [↑](#footnote-ref-4)
5. UN Committee General Comment No. 5 emphasizes the ‘essential element’ of independence. General Comment No. 2 reiterates the role of ‘Children’s Commissioners and similar independent bodies for the promotion and monitoring of the implementation of the Convention in States’ Parties’.  [↑](#footnote-ref-5)